

Memorandum 96-47

Obsolete Restrictions: Draft of Recommendation

Attached to this memorandum is a draft of the recommendation on obsolete land use restrictions, revised to incorporate Commission decisions made at the June meeting. The recommendation terminates land use restrictions 60 years after recordation unless a notice of intent to preserve a restriction is recorded during the 60-year period.

One issue was left unresolved at the June meeting — recordation of notice of intent to preserve a restriction that affects multiple parcels, particularly where the restriction is a part of a set of mutual restrictions.

Restriction That Affects Multiple Parcels

A typical case is the subdivision of a large tract into individually owned parcels pursuant to a plan for uniform and orderly development and use of the entire property by all of the initial purchasers as well as their successors in interest. Tract restrictions are imposed on each parcel, such as limitation of structures to a single-family residence, building setback requirements, height limitations, protection of views, etc. Under California law, these are enforceable mutual equitable servitudes. *Werner v. Graham*, 181 Cal. 175 (1919).

“When the owner of a subdivided tract conveys the various parcels in the tract by deeds containing appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all others. The agreement between the grantor and each grantee in such a case as expressed in the instruments between them is both that the parcel conveyed shall be subject to restrictions in accordance with the plan for the benefit of all other parcels and also that all other parcels shall be subject to such restrictions for its benefit.” *Id.* at 183.

If one parcel owner seeks to preserve the mutual equitable servitudes from expiration under the 60-year rule, should the owner be able to do that selectively, as to specific parcels (e.g., only for the block in which the owner’s parcel is located), or as to specific restrictions (e.g., keep setback but not height

limitation)? If a parcel owner preserves the restrictions against other properties, should that also have the effect of automatically preserving the restrictions in favor of the other properties against the parcel of the owner, by operation of mutuality? How, mechanically, are the restrictions to be preserved — must the parcel owner record a notice as to each parcel affected, or is there a mechanism by which the restrictions can be preserved as to the whole subdivision?

Common interest developments. These questions are moot as to equitable servitudes in a “common interest development” (condominium, planned development, or other arrangement involving common areas), since we have excluded those from coverage of our recommendation. But there are many other subdivisions that would not be classified as common interest developments for which the issues must be addressed.

Can parcel owner preserve selectively? The staff has no problem with allowing selective preservation of restrictions. A person entitled to enforce a restriction has a property right and should be able to relinquish it as to aspects of it the person has no interest in. To require preservation as to the entire subdivision and as to all restrictions would cause preservation of restrictions no one wants or cares about. It would also create problems in identifying every parcel that is subject to the restriction — which may not be obvious. One could imagine selective preservation in an arbitrary or vindictive manner — e.g. only as to left lot lines and not as to right lot lines, or only against a neighbor the person is quarreling with — but why should this not be allowed? If the restriction is truly obsolete, the neighbor still has available the same remedy the law has always provided — court termination of the restriction. We would add a provision along these lines:

888.037. Recordation of a notice of intent to preserve a restriction within the time prescribed in Section 888.030 preserves the restriction described in the notice for the benefit of the claimant or claimants named in the notice against the real property described in the notice.

Comment. Section 888.037 is a specific application of the general principles set out in Sections 880.310-880.330. Under these provisions, a person may preserve a restriction by recording a notice of intent to preserve the restriction. Section 880.310 (notice of intent to preserve interest). A person may record a notice on the person’s own behalf or on behalf of another claimant if the person is authorized to act on behalf of the other claimant. Section 880.320 (who may record notice). The notice must identify each claimant for

which the notice is recorded, the specific restriction or restrictions being preserved, and the property against which the restriction is claimed. Section 880.330 (contents of notice); see also Section 880.340 (form of notice).

Is preservation of restriction mutual? The theory of mutual equitable servitudes is that subdivision restrictions benefit and burden all parcels for mutual benefit; whether or not the restrictions satisfy the criteria for covenants that run with the land at law, equity will enforce the restrictions based on their mutuality. It would be anomalous to allow one-way preservation of an equitable servitude whose enforceability is based on its mutuality. The staff would provide that a person's preservation of a restriction enforceable as a mutual equitable servitude also preserves the restriction as against the person's own parcel.

888.038. Recordation of a notice of intent a restriction that is enforceable as a mutual equitable servitude preserves the restriction (1) for the benefit of the claimant or claimants named in the notice against the real property described in the notice and (2) for the benefit of the real property described in the notice against the claimant or claimants.

Comment. Section 888.038 makes clear that one party's recordation of a notice of intent to preserve a mutual equitable servitude does not destroy the mutuality of the equitable servitude — its benefits and burdens are preserved both for the party recording the notice and the party against whom it is recorded.

Is there a mechanism by which the restrictions can be preserved as to the whole subdivision? Must a person wishing to preserve a subdivision restriction identify each individual parcel in the notice of intent to preserve the restriction, or is there a way the entire subdivision and each parcel in it subject to the restriction can be bound. The problem here is the variety of forms subdivision restrictions may take, such as (1) reference in each deed to a recorded set of restrictions, (2) identical restrictions in each separate deed, (3) restrictions in the original tract deed but no references in individual parcel deeds carved out of the tract, (4) etc. The "subdivision" itself may or may not be easily defined in the records. The staff thinks it would be appropriate to allow recordation as to an entire subdivision in cases where the subdivision is identified in the restriction; otherwise, each affected parcel should be specified in the notice of intent to preserve the restriction.

888.039. In lieu of the legal description of the real property in which the interest is claimed as otherwise required by paragraph (3) of subdivision (b) of Section 880.330 and notwithstanding the provisions of Section 880.340, Section 888.037, or any other provision in this title, a notice of intent to preserve a restriction that is enforceable as a mutual equitable servitude may refer generally and without specificity to all property located within a tract or subdivision if the tract or subdivision is identified in the restriction as composed of parcels subject to the restriction pursuant to a general plan of restrictions common to all the parcels and designed for their mutual benefit.

Comment. Section 888.039 allows recordation of a single notice of intent to preserve a restriction enforceable as a mutual equitable servitude as to an entire subdivision if the subdivision is identified in the restriction. If the subdivision is not identified in the restriction, the restriction may be preserved as to the entire subdivision by identifying all parcels that are subject to the restriction.

Respectfully submitted,

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#H-407

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Marketable Title:
Enforceability of Land Use Restrictions

July 1996

California Law Revision Commission
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SUMMARY OF RECOMMENDATION

This recommendation would address two issues in enforcement of land use restrictions — it would provide a mechanism for clearing land title records of an obsolete restriction, and it would clarify the applicable statute of limitations for enforcement of breach of a restriction. Under these proposals:

(1) A land use restriction would expire of record 60 years after it was recorded, but could be preserved for another 60 years at a time by recording a statutory notice. The 60-year expiration period would not apply to a publicly-held or -imposed restriction, an environmental or conservation easement, or a common interest development equitable servitude.

(2) Breach of a restriction would be enforceable for a period of five years, but a failure to bring an action within the five year period would not waive the underlying restriction or the right to bring an action for another breach of the restriction.

1 wishing to preserve the property interest may do so by recording a statutory form
2 that extends the life of the interest.

3 This simple mechanism has been applied to rid the land title records of such
4 encumbrances as ancient mortgages and deeds of trust,⁷ dormant mineral rights,⁸
5 powers of termination,⁹ and unperformed contracts for sale of real property.¹⁰ The
6 Law Revision Commission recommends that it be applied to land use restrictions
7 as well.

8 Because a land use restriction may be intended to have enduring effect, a
9 relatively long 60-year expiration period is appropriate. The restriction could be
10 preserved by a person entitled to enforce the restriction for 60 years at a time by
11 recording a notice of intent to preserve the interest.

12 Some restrictions, supported by public policy, are intended to be permanent and
13 should not be subject to an automatic expiration period at all. These include (i)
14 restrictions imposed or enforceable by a public entity,¹¹ e.g., to provide public
15 access to the coast; (ii) environmental restrictions,¹² which protect against release
16 of hazardous materials; and (iii) conservation easements¹³ to preserve land in its
17 natural condition.

18 Equitable servitudes in common interest developments also should be exempt
19 from the 60-year expiration period. Restrictions of this type do not ordinarily
20 become obsolete because they are continually overseen and amended as
21 appropriate by their governing bodies. They remain enforceable unless
22 unreasonable.¹⁴

23 STATUTE OF LIMITATIONS

24 The statute of limitations applicable to violation of a restriction on land use is
25 likewise not clear. Although it is assumed that the general five-year statute
26 applicable to real property actions applies,¹⁵ there is authority to the contrary.¹⁶ In
27 theory, at least, a covenant would be governed by the four-year statute applicable

7. Civ. Code §§ 882.020-882.040.

8. Civ. Code §§ 883.210-883.270.

9. Civ. Code §§ 885.010-885.070.

10. Civ. Code §§ 886.010-886.050.

11. This is a specific application of the general marketable title rule. See Civ. Code § 880.240(c).

12. Civ. Code § 1471.

13. See, e.g., Civ. Code § 815 (conservation easements); Gov't Code §§ 51070 (Open Space Act of 1974), 51200 (California Land Conservation Act of 1965). This is a specific application of the general marketable title rule. See Civ. Code § 880.240(d).

14. Civ. Code § 1354.

15. See, e.g., 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 23.25, 23.32, at 1155, 1159 (1975).

16. See, e.g., *Lincoln v. Narom Development Co.*, 10 Cal. App. 3d 619, 89 Cal. Rptr. 128 (1970) (statute of limitations not applicable to breach of condition).

1 to a contract founded upon a written instrument,¹⁷ a condition or negative
2 easement would be governed by the five-year statute applicable to real property
3 actions,¹⁸ and an equitable servitude would not be subject to any statutory
4 limitation period but to such equitable doctrines as waiver, estoppel, and laches.¹⁹

5 Just as these various forms of land use restrictions that serve the same functions
6 should be uniformly subject to a 60-year expiration period, so should violation of
7 the restrictions be uniformly subject to a clear single statutory limitation period.

8 The general five-year limitation period for an action to recover real property²⁰ is
9 appropriate in an action for violation of a land use restriction; its application
10 should be made clear by statute.

11 Failure of a person to enforce a restriction within five years after violation
12 should preclude further action on that violation, but should not in itself be deemed
13 a waiver or abandonment of the underlying restriction. Non-enforcement of a
14 restriction for a particular violation may be considered as part of a pattern or
15 constellation of circumstances that indicate waiver or abandonment.²¹ However, to
16 imply waiver or abandonment of the underlying restriction from a failure to act on
17 a particular violation would undesirably precipitate enforcement actions in cases
18 where the holder of the restriction is otherwise inclined to be lenient.

17. Code Civ. Proc. § 337(1).

18. Code Civ. Proc. § 319.

19. See, e.g., 5 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:23, at 585 (2d ed. 1990).

20. See, e.g., Code Civ. Proc. § 319.

21. See, e.g., *Bryant v. Whitney*, 178 Cal. 640, 174 P. 32 (1918) (waiver); *Jewett v. Albin*, 90 Cal. App. 535, 266 P. 329 (1928) (waiver or estoppel).

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PROPOSED LEGISLATION

RESTRICTION DEFINED

Civ. Code § 784 (added). “Restriction”

SECTION 1. Section 784 is added to the Civil Code, to read:

784. “Restriction”, when used in a statute that incorporates this section by reference, means a limitation on the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.

Comment. Section 784 provides a definition of “restriction” for application in Chapter 8 (commencing with Section 888.010) (obsolete restrictions) of Title 5 and in Code of Civil Procedure Section 336 (statute of limitations). The reference to “declaration” includes a declaration of restrictions in a common interest development intended to be enforceable as equitable servitudes. See Section 1353(a).

MARKETABLE RECORD TITLE ACT

Civ. Code §§ 888.010-888.060 (added)

SEC. 2. Chapter 8 (commencing with Section 888.010) is added to Title 5 of Part 2 of Division 2 of the Civil Code, to read:

CHAPTER 8. OBSOLETE RESTRICTIONS

§ 888.010. “Restriction” defined

888.010. As used in this chapter, “restriction.” has the meaning provided in Section 784.

Comment. Section 888.010 implements application of this chapter to private land use restrictions of all types. See Section 784 (“restriction” means limitation on use of real property in deed or other instrument, whether in form of covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction). *Cf.* Section 815.1 (“conservation easement” defined). However, this chapter does not apply to a number of specified restrictions. See Sections 880.240 (interests excepted from title) and 888.020 (restrictions excepted). This chapter applies to negative easements; affirmative easements are governed by Chapter 7 (commencing with Section 887.010) (abandoned easements). For additional provisions applicable to conditions subsequent, see Chapter 5 (commencing with Section 885.010) (powers of termination).

§ 888.020. Restrictions excepted

888.020. This chapter does not apply to any of the following:

- (a) A restriction that is an enforceable equitable servitude under Section 1354.
- (b) An environmental restriction under Section 1471 or other restriction that serves substantially the same function.
- (c) A restriction enforceable by a public entity or recorded in fulfillment of a requirement of a public entity, provided that fact appears on the record.

1 (d) A conservation easement under Chapter 4 (commencing with Section 815) of
2 Title 2, or a negative easement or other restriction that serves substantially the
3 same function, including an open space easement under the Open Space Act of
4 1974 (Chapter 6.6 (commencing with Section 51070) of Part 1 of Division 1 of
5 Title 5 of the Government Code) and a restriction under the California Land
6 Conservation Act of 1965 (Chapter 7 (commencing with Section 51200) of Part 1
7 of Division 1 of Title 5 of the Government Code), regardless whether the easement
8 or other restriction is given voluntarily and whether or not it is perpetual in
9 duration.

10 **Comment.** Section 888.020 supplements the general exceptions from this title provided in
11 Section 880.240. Nothing in this section precludes the parties to an excepted restriction from
12 providing by agreement that this chapter applies to the restriction.

13 Subdivision (a) excepts equitable servitudes in common interest developments from expiration
14 by operation of law under this chapter. Enforceability of those restrictions is governed by Section
15 1354 (restriction enforceable “unless unreasonable”).

16 Subdivision (b) applies to a restriction intended to protect present or future human health or
17 safety or the environment as a result of the presence of hazardous materials (Health and Safety
18 Code Section 25260), whether in the form of a covenant or in another form. Compare Section
19 1471 (covenant) with Sections 784, 888.010 (“restriction” defined).

20 Subdivision (c) is a specific application of Section 880.240(c). A public land use restriction is
21 an interest in property that is excepted from the operation of the Marketable Record Title Act.
22 Restrictions imposed by state and regional land use agencies, such as the California Coastal
23 Commission, the San Francisco Bay Conservation and Development Commission, the Tahoe
24 Regional Planning Agency, and the California Tahoe Conservancy, as well as restrictions
25 imposed by federal agencies, are included within the coverage of subdivision (c).

26 Subdivision (d) broadens the exception provided in Section 880.240(d). A “conservation
27 easement” within the meaning of Section 815 must be conveyed voluntarily and is perpetual in
28 duration. Subdivision (d) excepts a negative easement or other restriction that serves substantially
29 the same function as a conservation easement even though it may have been conveyed in
30 fulfillment of a requirement of a public entity and even though it may not be perpetual in
31 duration. An open space easement under the Open Space Act of 1974, for example, or a
32 restriction under the Williamson Act, may be limited in duration. See Gov’t Code §§ 51075(d)
33 (open space easement), 51244-51244.5 (contract to limit use of agricultural land).

34 **§ 888.030. Expiration of restriction**

35 888.030. (a) A restriction of record expires at the last of the following times:

36 (1) Sixty years after the date the instrument creating or otherwise evidencing the
37 restriction is recorded.

38 (2) Sixty years after the date a notice of intent to preserve the restriction is
39 recorded, if the notice is recorded within the time prescribed in paragraph (1).

40 (3) Sixty years after the date an instrument creating or otherwise evidencing the
41 restriction or a notice of intent to preserve the restriction is recorded, if the
42 instrument or notice is recorded within 60 years after the date such an instrument
43 or notice was last recorded.

44 (b) This section applies notwithstanding any provision to the contrary in the
45 instrument creating or otherwise evidencing the restriction or in another recorded
46 document unless the instrument or other recorded document provides an earlier
47 expiration date.

1 **Comment.** Section 888.030 provides for expiration of a restriction after 60 years,
2 notwithstanding a longer or indefinite period or automatic renewal provided in the instrument
3 creating the restriction. The expiration period runs from the date of recording rather than the date
4 of creation of the restriction because the primary purpose of this section is to clear record title.

5 The expiration period can be extended for up to 60 years at a time by recordation of a notice of
6 intent to preserve the restriction. See Section 880.310 (notice of intent to preserve interest). The
7 form of a notice of intent to preserve the restriction is prescribed in Section 880.340. For persons
8 entitled to record a notice of intent to preserve the restriction, see Section 880.320. Recordation of
9 a notice of intent to preserve the restriction does not enable enforcement of a restriction that is
10 unenforceable because it has been abandoned or become obsolete due to changed conditions or
11 otherwise. See Sections 880.310 (notice of intent to preserve interest), 888.040 (chapter does not
12 revive unenforceable restriction), & Comments.

13 For the effect of expiration of a restriction pursuant to this section, see Section 888.050 (effect
14 of expiration). This section does not affect restrictions excepted by statute from its operation. See
15 Sections 880.240 (interests excepted from title), 888.020 (restrictions excepted).

16 **888.040. Chapter does not revive unenforceable restriction**

17 888.040. Nothing in this chapter shall be construed to revive or make
18 enforceable a restriction that is otherwise unenforceable before expiration of the
19 times provided in Section 888.030, whether because the restriction is abandoned,
20 obsolete, unlawful, or for any other reason.

21 **Comment.** Section 888.040 supplements Sections 880.250(b) (title does not revive or extend
22 period of enforceability under statute of limitations) and 880.310(b) (recordation of notice of
23 intent to preserve interest does not preclude court determination of unenforceability). A restriction
24 that is obsolete is unenforceable. See, e.g., discussion in 4 B. Witkin, *Summary of California Law*
25 *Real Property* §§ 502-07, at 681-684 (9th ed. 1987). A discriminatory restriction is void and
26 unenforceable. See, e.g., Section 53 (restriction on sex, race, color, religion, ancestry, national
27 origin, or disability).

28 **§ 888.050. Effect of expiration of restriction**

29 888.050. Expiration of a restriction pursuant to this chapter makes the restriction
30 unenforceable and is equivalent for all purposes to a termination of the restriction
31 of record.

32 **Comment.** Section 888.050 provides for the clearing of record title to real property by
33 operation of law after a restriction has expired under Section 888.030 (expiration of restriction).
34 Title can be cleared by judicial decree prior to the time prescribed in Section 888.030 in case of
35 an otherwise unenforceable restriction. See Section 888.040 & Comment.

36 **§ 888.060. Operative date**

37 888.060. (a) This chapter is operative January 1, 1998.

38 (b) Subject to Section 880.370, this chapter applies on the operative date to all
39 restrictions, whether executed or recorded before, on, or after the operative date.

40 **Comment.** Section 888.060 makes clear the legislative intent to apply this chapter immediately
41 to existing restrictions. Section 880.370 provides a five-year grace period for recording a notice
42 of intent to preserve a restriction that expires by operation of this chapter before, on, or within
43 five years after the operative date of this chapter.

STATUTE OF LIMITATIONS

Code Civ. Proc. § 336 (amended). Five year statute of limitations

SEC. 3. Section 336 of the Code of Civil Procedure is amended to read:

336. Within five years:

(a) An action for mesne profits of real property.

(b) An action for violation of a restriction, as defined in Section 784 of the Civil Code. The period prescribed in this subdivision runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. A failure to commence an action for violation of a restriction within the period prescribed in this subdivision does not waive the right to commence an action for any other violation of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable. This subdivision shall not bar commencement of an action for violation of a restriction before January 1, 2000, and until January 1, 2000, any other applicable statutory or common law limitation shall continue to apply to such an action.

Comment. Subdivision (b) is added to Section 336 to make clear that the statutory limitation period applicable to enforcement of a restriction is five years, consistent with the general statutes governing recovery of real property. *Cf.* Section 319 (five years). This ensures a uniform limitation period regardless whether the restriction is in the form of a covenant, condition, negative easement, or equitable servitude. See Civ. Code § 784 (“restriction” defined); *cf.* 2 A Bowman, Ogden’s Revised California Real Property Law §§ 23.25, 23.32, at 1155, 1159 (1975) (five years). It should be noted that, while equitable servitudes in common interest developments are covered by this section, they are not subject to expiration under the obsolete restriction provisions of the Marketable Record Title Act. See Civ. Code § 888.020(a) (common interest development equitable servitudes excepted).

For purposes of subdivision (b), the time when a homeowners’ association is deemed to have knowledge of a violation of a restriction would be determined under general principles of imputed knowledge. See, e.g., Civil Code § 2332. Thus an incorporated or unincorporated homeowner’s association is deemed to have knowledge of a violation of a restriction when an appropriate officer or agent of the association has knowledge of the violation.

Under subdivision (b), a failure to enforce a violation within the limitation period should not alone be grounds to imply a waiver or abandonment of the restriction. However, such a failure may, combined with other circumstances, be grounds for waiver or estoppel or evidence of abandonment or obsolescence. See, e.g., *Bryant v. Whitney*, 178 Cal. 640, 174 P. 32 (1918) (waiver); *Jewett v. Albin*, 90 Cal. App. 535, 266 P. 329 (1928) (waiver or estoppel). It should be noted that a restriction may become unenforceable due to passage of time or for other reasons. *Cf.* Civ. Code §§ 888.030 (expiration of restriction), 888.040 (chapter does not revive unenforceable restriction), & Comments.

Subdivision (b) provides a two-year grace period to enable action on a violation that would become unenforceable upon enactment of this chapter and a shorter grace period for action on a violation that would become unenforceable within two years after enactment of this chapter. The two-year grace period does not operate to extend the time to act on a violation that would become unenforceable by operation of law apart from this chapter, either pursuant to case law limitations or applicable statutes of limitation.